Supreme Court, U.S.
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No. 98 286

IN THE

Supreme Court of the United States

October Term, 1997

BURTON L. FISH .

Petitioners,

vs.

MARSH, SPAEDER, BAUR, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF and THE OHIO CASUALTY INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the failure of the courts below, in sustaining a demurrer to a Complaint, to identify, expressly or by NECESSARY IMPLICATION, the components of a supposed written contract of stipulation in letter form, alleged to exist as a matter of law, or to justify its ascription to a person, not a party thereto, constitutes a denial of the Constitutionally protected right to trial by jury, and the Constitutionally protected right to due process (failure to make adequate record for review)?

PARTIES TO THE PROCEEDINGS

All of the parties to this action, at any stage of the proceedings, are listed in the caption.

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Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania (Western District) entered in this action on March 11, 1998 (A1).

OPINIONS BELOW

The Decision of the Supreme Court of Pennsylvania at Nos. 693-94 Western District Allocatur Docket 1197 is unreported. The Decision of the Superior Court of Pennsylvania, at Docket No. 01066-PGH—1996 and Docket No. 01397—PGH 1996 are unreported (A2-A6). The Decision of the Court of Common Pleas of Erie County, Pennsylvania, at Docket No. 1995—11703 (Civil—law) are unreported (A7-A17).

BASIS FOR JURISDICTION

The *PER CURIAM* denial of Petitioners' Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was entered on March 11, 1998 (A1). Petitioners have raised and preserved their right to a trial by jury, guaranteed by the U.S. Constitution, Amendments 5, 7, and 14. This Court has jurisdiction to review the action of the Supreme Court of Pennsylvania pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment 7:

> In suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

Pennsylvania Rules of Civil Procedure 2028, Preliminary Objections:

> (a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds:
>
> * * *
>
> (4) legal insufficiency of a pleading (demurrer)
>
> * * *

STATEMENT OF THE CASE

Petitioners herein were counsel to plaintiffs in an underlying case (personal injury arising from a motor vehicle collision), which is still pending before the courts.

Respondents herein were counsel (and insurer) in that same underlying case.

Disputes arose concerning the conduct of the litigation in the underlying case. A Complaint was filed, alleging a variety of legal theories, most especially defamation (the defamation occurring, also, in contexts not covered by judicial privilege).

Although not required to do so by state law, Petitioners alleged that the defamation was untrue. The Respondents filed Preliminary Objections (Demurrer), which admit the truth of the allegations of the Complaint.

The lower court sustained the Preliminary Objections (Demurrer). Its avowed basis for doing so was the existence, within the record before it, of a written contract of stipulation in letter form. Neither the Respondents, nor the lower court, nor the panel of the Superior Court of Pennsylvania, have expressly identified the component parts of that supposed written contract of stipulation in letter form. Respondents have identified a document which they allege to be an "offer" but have not identified a document which they allege to be an "acceptance."

By necessary implication, however, Petitioners infer that the courts below, have relied upon two documents (See Appendix at pages A23-A27).

That these two documents comprise a written contract of stipulation in letter form is highly suspect since Restatement of Contracts, Second 23, 58, 59, suggest that an acceptance (the Brydon letter) must be in the same terms as the supposed offer (the surplusage appearing below the signature of counsel on the brief filed before common law arbitrators in an uninsured motorist proceeding (a case underlying the underlying case).

However, the point is that the brief was filed on behalf of an uninsured motorist claimant, the driver, Leon C. Fish. No brief was filed on behalf of the passenger, Bertha E. Fish, who was at that time merely asserting a derivative claim for loss of consortium.

There is no basis, real or imagined, known or presumed, for ascribing the supposed written contract of stipulation in letter form to her (whatever the construction of the correspondence may be, under state law), at least, not as a matter of law.

Since the brief cannot be ascribed to Bertha E. Fish, as a matter of law, the grant of the demurrer was error, the effect of that error being to deny to Petitioners that right to trial by jury, which is guaranteed to them by the Constitutional provision relied upon herein.

Since neither the Respondents, nor the courts below, have identified the components of the supposed written contract of stipulation in letter form, they have never addressed the problem, sought to be raised by Petitioners of whether or not it could be ascribed to Bertha E. Fish.

REASONS FOR GRANTING THE WRIT

Petitioners fully recognize that the information provided thus far may not suggest a matter of sufficient importance to justify the giving of the attention of the Supreme Court of the United States to it.

However, Petitioners conceive that the Writ must first be granted before an Application to Supplement the Record can be considered.

As can be seen, Petitioners cannot draft an effective Petition for a Writ of Certiorari, when the courts below have failed to identify the component parts of the supposed written contract of stipulation in letter form, which has been ascribed to Bertha E. Fish.

If the Writ were granted, Petitioners would then apply for an Order to Supplement the Record, as indicated. The original record, in this case, was never lodged with the Supreme Court of Pennsylvania, which denied allocatur. That original record had been lodged with the Superior Court of Pennsylvania, but returned by it, to the Erie County (Pennsylvania) Court of Common Pleas, while the application for allocatur was pending before the Supreme Court of Pennsylvania. Thus the original record would be available to the judge of the lower court, who sustained the demurrer in the first place. However, that judge is no longer a member of that bench (he has since been elected to the Superior Court of Pennsylvania).

The next common pleas judge to consider the question of the component parts of the supposed written contract of stipulation in letter form, could only apply to the Respondents for a statement of their position.

Of course, Respondents could incorporate their position into their Respondents' Brief in Opposition. They failed to do so at any stage of the proceedings to this point.

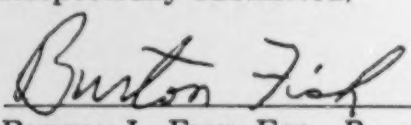
Should they do so, or should the record be supplemented as requested, then Petitioners would respectfully request an opportunity to amend this Petition for Writ of Certiorari, as they might then deem appropriate.

Should Respondents fail to file a Respondents' Brief in Opposition, at all, or fail to file one which suggests the component parts of the supposed written contract of stipulation in letter form, which they would ascribe to Bertha E. Fish, then Petitioners would conclude, legal principles to the contrary, notwithstanding, that there was none, and that the award of counsel fees to them, punishing Petitioners for pursuing the matter, was burdensome, in the extreme.

CONCLUSION

Petitioners conclude that the Supreme Court of the United States is justified in giving its attention to this matter (and necessary to protect the Constitutionally guaranteed right to trial by jury) in the limited sense of affording an opportunity to supplement the record, thereby affording to Petitioners an opportunity to prepare a more effective Petition, and thereby, in turn, affording to them the due process of law, thus far denied to them, as was their right to trial by jury.

Respectfully submitted,

by: 

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APPENDIX

Order of the Supreme Court of Pennsylvania, Western District, Denying Petition for Allowance of Appeal Dated March 11, 1998

IN THE SUPREME COURT
OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 693-94 Western District
Allocatur Docket 1997

BURTON L. FISH AND BUFFALO ROAD PROFESSIONALS, P.C.,

Petitioner,

v.

MARSH, SPAEDER, BAUR, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF and THE OHIO CASUALTY INSURANCE COMPANY,

Respondents.

Petition for Allowance of Appeal
from Superior Court

ORDER

PER CURIAM:

AND NOW, this 11th day of March, 1998, the Petition for Allowance of Appeal is hereby DENIED.

A True Copy Candace Y. Fry
as of: March 11, 1998
Attest: CANDACE FRY
Chief Clerk
Supreme Court of Pennsylvania

Decision of the Superior Court of Pennsylvania, Filed July 18, 1997

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 01066 PITTSBURGH, 1996
NO. 01397 PITTSBURGH, 1996

BURTON L. FISH AND BUFFALO ROAD PROFESSIONALS, P.C.,

Appellants,

v.

MARSH, SPAEDER, BAUR, SPAEDER & SCHAAF, A PARTNERSHIP, JOHN C. BRYDON, FRANCIS J. KLEMENSIC AND WILL J. SCHAAF AND THE OHIO CASUALTY INSURANCE COMPANY.

Appeal from the Orders in the Court of Common Pleas of Erie County, Civil Division, No. 1995-11703

BEFORE: TAMILIA, J., FORD ELLIOTT, J., and BROSKY, J.

MEMORANDUM: FILED: JULY 18, 1997

Appellants, Burton L. Fish and Buffalo Road Professionals, P.C., take this appeal, pro se, from the May 13, 1996 Order, inter alia, granting appellees' preliminary objections and dismissing appellants' complaint with prejudice and the June 28, 1996 Order awarding counsel fees to appellees in the amount of $2,312.50.

The procedural and factual history is as follows. On October 22, 1987, Leon C. Fish (hereinafter Leon) and Bertha E. Fish (hereinafter Bertha), parents of Plaintiff, Attorney Burton Fish, were involved in a car accident. Although neither Leon nor Bertha could recall any details which preceded or occurred during the accident, the police reports and other evidence indicated that the driver of the other vehicle, Deborah Heliker, crossed the center line and collided with the Fishes' vehicle. It was also revealed that Ms. Heliker was uninsured. Attorney Fish filed suit on behalf of his parents against the uninsured motorist. He also brought suit against his father on behalf of his mother. Ohio Casualty Insurance Company, Leon's insurer, retained Defendant Attorney John Brydon to represent Leon. Meanwhile, Leon and Bertha proceeded to an uninsured motorist arbitration proceeding where both the insured and the carrier, Ohio Casualty, agreed to certain stipulations. Part of the stipulation stated that Leon was not contributorily nor comparatively negligent. Thus, the full single policy limits were awarded to the Fishes. Attorney Fish pursued an action on behalf of Bertha against the driver of the other vehicle and Leon, who it had previously been stipulated was not negligent by a written stipulation in letter form. Subsequently, a motion for summary judgment was filed by Defendant Francis J. Klemensic on behalf of Leon in the case of Bertha versus Leon and Heliker. Attorney Klemensic argued that the prior stipulation during the uninsured motorist arbitration hearing that Leon was not negligent entitled him to judgment as a matter of law. During argument, Attorney Fish vehemently insisted that the stipulation of Leon's non-negligence was never entered into even though he recognized that the full limits of coverage could not have been obtained without such finding. After a review of all the documents (including the written letter stipulation) and hearing arguments, the Court granted the

> motion for summary judgment. Thereafter, Burton Fish and Buffalo Road Professionals filed a complaint against the Defendants alleging bad faith bargaining, breach of duty to disclose, breach of contract, malicious use of process, abuse of process, tortious outrage, violation of professional ethics, tortious interference with business, conspiracy, perjury, subordination of perjury, fraud, collusion, false pretenses, nondisclosure, misrepresentation, official oppression, obstructing justice, defamation, disparagement, intentional infliction of mental distress, and vicarious liability. The Plaintiffs also put before the Court a motion to supplement the record and motion to disqualify Defendant, John Brydon, as counsel.

(Slip Op., Joyce, J., 5/13/96, pp. 1-2.)

In reaching its decision to dismiss appellants' complaint, the trial court analyzed eleven counts of the civil complaint and determined that several of the counts were not recognizable causes of action in Pennsylvania, several others were criminal allegations and the remaining counts were without merit. Appellants thereafter filed a timely notice of appeal followed by a statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b), which in essence was a five-page incoherent dissertation as to why no stipulation existed between their clients in the underlying tort case. On appeal to this Court, however, appellants, in a brief in total derogation of the Pennsylvania Rules of Appellate Procedure, raise the following claims:

> 1. Does an attorney's violation of PRCP 222, Attorneys as Witnesses, and Rules of Professional Conduct 3.7, Lawyer as Witness (comment, code comparison), constitute a waiver of judicial immunity?
>
> 2. If not, does any count of Plaintiffs' complaint allege non-privileged conduct, and thereby set forth a viable cause of action?

3. If any one Count of the complaint does thus set forth a viable cause of action, then are there others, and if so, which ones?

4. Assuming that one or more Counts set forth viable causes of action, does the Complaint itself reveal a fatal flaw that would justify dismissal, an affirmative defense (res judicata, pendency of another action)?

5. Were counsel fees properly awarded in this case against plaintiff for obdurate conduct, the mere filing of a praecipe for a writ of summons and a set of interrogatories, when defendants had not to that date disclosed their reliance upon the Brydon letter as an acceptance, despite attempted correspondence with Schaaf?

6. Does the lower court's role as a necessary witness require his recusal?

After our review of the record, and to the best of our ability considering appellants' lack of conformity to the Pennsylvania Rules of Appellate Procedure, we find all of the allegations raised in the underlying complaint and in the present appeal relate to the stipulation and subsequent grant of summary judgment in the underlying civil case. Specifically, the trial court made a specific finding in the underlying case, ***Fish v. Helicker and McCray v. Fish,*** No. 2587 Erie (1989), that a stipulation did exist and it is now apparent appellants are attempting to relitigate the granting of summary judgment through a separate lawsuit against opposing counsel. In fact, as noted in appellants' brief, the underlying case is still an ongoing matter.[1] Accordingly, we find appellants cannot collaterally attack the entry of

[1] We found nothing in the record pertaining to the underlying action and, therefore, rely on the representation of appellants.

summary judgment against their client by filing a separate civil complaint against the opposing party's counsel. In essence, this would require this Court to reach the merits as to the existence and validity of a stipulation at issue in a collateral proceeding. *See Commonwealth v. Ryan,* 358 Pa. Super. 459, _____, 517 A.2d 1324, 1327 (1986) ("Clearly, prior judgments are presumed to be valid and may not be collaterally attacked in a subsequent proceeding.").[2]

Appeals quashed.

Cases dismissed.

Jurisdiction relinquished.

---

[2] We note that none of the claims raised in appellants' brief were included in their Rule 1295(b) statement, thus denying the trial court the opportunity to address the claims and greatly hindering appellate review. In fact, appellants acknowledge this error in their appellate brief. We, therefore, find the failure to raise the issues amounts to a waiver. *Taylor v. Owens-Corning Fiberglas Corp.,* 446 Pa. Super. 174, 666 A.2d 681 (1995).

Opinion and Order of the Court of the Common Pleas of Erie County, Pennsylvania, Dated May 13, 1996

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

NO. 11703-1995

BURTON L. FISH and BUFFALO ROAD PROFESSIONALS, P.C.,

Plaintiffs,

V.

MARSH, SPAEDER, BAUER, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF, and THE OHIO CASUALTY INSURANCE COMPANY,

Defendants.

OPINION AND ORDER

Burton L. Fish, Esq. on behalf of Plaintiffs
Will J. Schaaf, Esq. on behalf of Defendants

Joyce, J., May 13th, 1996.

This matter is before the Court on the Defendants' Preliminary Objections to Plaintiffs' Complaint. For the following reasons, the Defendants' Preliminary Objections are granted.

The procedural and factual history is as follows. On October 22, 1987, Leon C. Fish (hereinafter Leon) and Bertha E. Fish (hereinafter Bertha), parents of Plaintiff, Attorney Burton Fish, were involved in a car accident. Although neither Leon nor Bertha could recall any

details which preceded or occurred during the accident, the police reports and other evidence indicated that the driver of the other vehicle, Deborah Heliker, crossed the center line and collided with the Fishes' vehicle. It was also revealed that Ms. Heliker was uninsured. Attorney Fish filed suit on behalf of his parents against the uninsured motorist. He also brought suit against his father on behalf of his mother. Ohio Casualty Insurance Company, Leon's insurer, retained Defendant Attorney John Brydon to represent Leon. Meanwhile, Leon and Bertha proceeded to an uninsured motorist arbitration proceeding where both the insured and the carrier, Ohio Casualty, agreed to certain stipulations. Part of the stipulation stated that Leon was not contributorily nor comparatively negligent. Thus, the full single policy limits were awarded to the Fishes. Attorney Fish pursued an action on behalf of Bertha against the driver of the other vehicle and Leon, who it had previously been stipulated was not negligent by a written stipulation in letter form. Subsequently, a motion for summary judgment was filed by Defendant Francis J. Klemensic on behalf of Leon in the case of Bertha versus Leon and Heliker. Attorney Klemensic argued that the prior stipulation during the uninsured motorist arbitration hearing that Leon was not negligent entitled him to judgment as a matter of law. During argument, Attorney Fish vehemently insisted that the stipulation of Leon's non-negligence was never entered into even though he recognized that the full limits of coverage could not have been obtained without such finding. After a review of all the documents (including the written letter stipulation) and hearing arguments, the Court granted the motion for summary judgment. Thereafter, Burton Fish and Buffalo Road Professionals filed a complaint against the Defendants alleging bad faith bargaining, breach of duty

to disclose, breach of contract, malicious use of process, abuse of process, tortious outrage, violation of professional ethics, tortious interference with business, conspiracy, perjury, subordination of perjury, fraud, collusion, false pretenses, nondisclosure, misrepresentation, official oppression, obstructing justice, defamation, disparagement, intentional infliction of mental distress, and vicarious liability. The Plaintiffs also put before the Court a motion to supplement the record and motion to disqualify Defendant, John Brydon, as counsel.

The Defendants filed preliminary objections to the Plaintifffs' complaint in the nature of a demurrer. In ruling on the preliminary objections, "this Court is required to accept as true all well-pleaded facts in the complaint, as well as all inferences reasonably deducible therefrom but is not required to accept the pleader's conclusions or averments of law. We are only to determine whether sufficient facts have been pled which would permit recovery if ultimately proven. All doubts are to be resolved in favor of the sufficiency of the complaint." ***Pelagatti v. Cohen,*** 370 Pa. Super. 422, 536 A.2d 1337 (1987).

Count I of the Plaintiffs' complaint alleges that Defendant Attorney Brydon "had a duty, in bargaining with Plaintiff (Attorney Fish), to bargain in good faith, to the end that a real and mutual assent be knowingly given to the agreement reached, if any." (Plaintiffs' Complaint, Paragraph 28). Plaintiffs contend that this duty exists in all negotiations among parties but particularly between co-counsel. Furthermore, the Plaintiffs maintain, as a result of Defendant Brydon's alleged bad faith bargaining, Plaintiff (Attorney Fish) inadvertently entered into the stipulation that Leon was

not negligent. Although this cause of action is entitled "bad faith bargaining", which is not a recognized cause of action in Pennsylvania, the Plaintiff's (Attorney Fish) claim sounds in negligence. It is well settled Pennsylvania law that a claim of negligence may only be maintained where privity exists, as between an attorney and client, but not by third parties against the attorney. ***Guy v. Liederbach,*** 501 Pa. 47, 459 A.2d 744 (1983); ***Aiello v. Ed Saxe Real Estate, Inc.,*** 327 Pa. Super. 429, 476 A.2d 27 (1984). Therefore, Count I of the complaint is dismissed.

The second count of the Plaintiffs' complaint alleges that Defendant Brydon breached his duty to disclose to the Plaintiff (Attorney Fish) the terms of the stipulation entered into on June 16, 1992, thereby causing the Plaintiff (Attorney Fish) to expend time and energy n the case of Bertha versus Leon when Attorney Brydon knew or should have known that the Plaintiffs were engaging in such efforts. Again, there does not exist any case law in Pennsylvania that imposes a duty upon one attorney to remind another attorney of his own stipulation or to advise another attorney how to handle his own case. Therefore, Count II is without merit and is dismissed.

Count III of the Plaintiffs' complaint avers that Defendants Brydon and Klemensic breached an oral contract. Attorney Fish seeks to impose contractual obligations upon Defendants Brydon and Klemensic, binding them to the Plaintiffs' desire to later pursue Bertha's claim against Leon while agreeing to a stipulation that Leon was not negligent in the case of the Fishes versus Heliker. The breach of this alleged contract occurred when the Defendants filed the motion for summary judgment based upon the stipulation that Leon was not negligent. The Plaintiff's (Attorney Fish)

position is difficult to comprehend. In the Leon versus Heliker proceeding, it was to Attorney Fish's father's benefit that a stipulation stating he was not negligent was agreed upon so that he could recover the full amount under his uninsured motorist policy. Alternatively, Attorney Fish's mother could only prevail against her husband if he was found negligent. Attorney Fish's obvious conflict of interest, coupled with his failure to conceptualize the ramifications of his actions created his own predicament. This Court has not found any case law nor has any been cited by Plaintiff (Attorney Fish) that would contractually bind what would be the agreement of attorneys to enter into a stipulation in one proceeding while orally contracting not to make the stipulation binding in another. Therefore, Count III is without merit and is dismissed.

Count IV alleges the Defendants committed an abuse and malicious use of process, tortious outrage, and a violation of professional ethics. Tortious outrage is not a recognized cause of action in this Commonwealth. Malicious use and abuse of process are properly referred to as wrongful use of civil proceedings. 42 Pa. C.S.A. §8351 states "A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings. . . ." The Defendants are alleged to have engaged in this behavior when they filed their motion for summary judgment. The case of ***Pawlowski v. Smorto,*** 403 Pa. Super. 71, 588 A.2d 36 (1991) is analogous to the case at hand. In ***Pawlowski,*** the appellees reported appellant to the district attorney and state police for the alleged perjurious statements appellant made during a hearing on preliminary objections. Appellant filed suit averring wrongful use of civil proceedings. The Court held:

> Clearly, the gravamen of action for wrongful use of civil proceedings is that the defendant has wrongfully procured, initiated or continued civil proceedings against the plaintiff. Here, however, appellant was not a party to the underlying civil action in which he alleges that appellees acted wrongfully. Appellant was *counsel* for the plaintiff, Mr. and Mr. Kopas, in that action. Thus, there is no conceivable ground upon which appellant could plead a cause of action for wrongful use of civil proceedings. ***Lessard v. Jersey Shore State Bank,*** 702 F.Supp. 96 (M.D. Pa. 1988) (a person who is not a party to the underlying lawsuit cannot bring an action for malicious use of process against a plaintiff in the underlying lawsuit).

This Court agrees with the ruling in ***Pawlowski***. Therefore, since the Plaintiffs were not a party to the underlying civil proceedings in which they allege the Defendants acted wrongfully, Plaintiff (Attorney Fish) may not maintain a cause of action for wrongful use of civil proceedings. Thus, Count IV is without merit and is dismissed.

The Plaintiffs' fifth count contends that Defendant Klemensic engaged in tortious interference with business or profession. There are four elements of this cause of action which must be sufficiently pled:

> (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party;
>
> (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;
>
> (3) the absence of privilege or justification on the part of the defendant; and
>
> (4) the occasioning of actual legal damage as a result of the defendant's conduct.

* * * * * *

The Restatement (Second of Torts defined "actual damages" for interference with a contract as follows, at §774A:

(1) one who is liable to another for interference with a contract or prospective contractual relation is liable for damages for

(a) the pecuniary loss of the benefits of the contract or or the prospective relation;

(b) consequential losses for which the intereference is a legal cause; and

(c) emotional distress or actual harm to reputation, if they are reasonable to be expected to result from the interference. . . . (Citations omitted).

Pawlowski, supra.

The Plaintiffs have not established that the defendants acted purposefully with the intent to harm the Plaintiffs' relationship with their client. In fact, the actions of the Defendants were merely in accordance with their professional duty to represent their client, Leon, to the best of their ability. Also, actual legal damage has not been sufficiently plead; plaintiff does not allege that his client has terminated their contract for professional services or failed to perform her end of the contract. He only alleges that his "professional skill was discredited in her eyes". "In the absence of pecuniary loss, an action for interference with contract brought for the purpose of recovering damages for loss of reputation only, would be nothing more than a defamation action in another caption." ***Pelagatti v. Cohen,*** 370 Pa. Super. 422, 536 A.2d 1337 (1987). Since the Plaintiffs have pled defamation in another count, Count V is not only meritless, but repetitive and is dismissed.

Count VI of the Plaintiffs' complaint alleges conspiracy, perjury, subornation of perjury, fraud, collusion, false pretenses, non-disclosure and misrepresentation. Initially, the Court is chagrined to advise Attorney Fish that perjury is a criminal matter and not the proper subject of a civil complaint. As for the other allegations, it has already been established that a stipulation was entered into which instigated the motion for summary judgment. The allegations of fraud, collusion, false pretenses, non-disclosure, and misrepresentation are all premised on the Defendants' use of the stipulation as a basis for the motion for summary judgment, despite the Plaintiff's (Attorney Fish) insistence that he did not intend for such stipulation to be binding. The fact remains, however, that Plaintiffs did enter into a stipulation and, thus, this claim lacks the necessary element to these accusations that the Defendants made a misrepresentation or false assertion in their motion for summary judgment. In regards to the conspiracy allegation, "absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act." ***Pelagatti, supra.*** Since there does not exist a cause of action for fraud, misrepresentation, collusion, non-disclosure, and false pretenses, there can be no conspiracy. Again, Count VI is meritless and is dismissed.

Count VII of the Plaintiffs' complaint alleges official oppression and obstruction of justice. Again, obstruction of justice is a criminal action and not the proper subject of a civil complaint. The Court is unsure as to what the Plaintiff is alleging in regard to the official oppression. Official oppression insinuates that some form of judicial misconduct has resulted in damage to the plaintiff thereby giving rise to a cause of action. Not only is

official oppression not a recognized cause of action in this Commonwealth, the Court is not named as a defendant in this lawsuit. Therefore, this count is meritless and is dismissed.

Defamation, disparagement and intentional infliction of emotional distress comprise Count VIII of the Plaintiffs' complaint. The alleged defamatory statement consists of the Defendants' publication of the stipulation that the Plaintiff, in fact, entered into. Truth has long been an absolute defense to defamation in this Commonwealth. ***Pelagatti, supra.*** Furthermore, statements made by attorneys in the course of or pertinent to any stage of judicial proceedings are absolutely privileged and, therefore, cannot be the basis for liability for defamation. ***Pawlowski, supra.*** As to the claim of intentional infliction of emotional distress, the Plaintiffs have not pled that they suffered any physical injury as a result of their humiliation, embarrassment or mental anguish and, therefore, cannot recover for the alleged distress. ***Rolla v. Westmoreland Health System,*** 438 Pa. Super. 33, 651 A.2d 160 (1994). Count VII is meritless and is dismissed.

Count IX of the Plaintiffs' complaint contends Defendants Brydon, Klemensic and Schaaf are vicariously liable for the wrongs alleged in Counts I through VIII since these wrongs were "committed in furtherance of the partnership of which they are members." The Defendant firm of Marsh, Spaeder, Bauer, Spaeder & Schaaf is viariously liable for the acts of its members, Plaintiffs argues. Lastly, Count IX alleges the Defendant Ohio Casualty Insurance Company is vicariously liable since it employed the Marsh Firm and its members to represent Leon Fish. Counts I through VIII do not contain sufficient facts which would

permit recovery. Hence, the Defendants cannot be held to be vicariously liable when there is no underlying liability. Count IX lacks merit and is dismissed.

Count X demands damages. Obviously, this Count is dismissed since it has heretofore been determined that there does not exist any cause of action against Defendants that would entitle Plaintiffs to damages. Plaintiff's (Attorney Fish) pleading damages in a separate count clearly demonstrates his lack of basic legal knowledge. This Count is likewise dismissed.

Count XI states "The legal theories set forth in the preceding paragraphs are not exhaustive, plaintiffs being only required to allege facts which entitle them to relief, and accordingly, plaintiffs anticipate that the Court will not sustain Preliminary Objections, if, in its judgment, plaintiff is entitled to relief on any legal theory whatsoever, whether or not such legal theory is herein set forth." This pleading, indicative of the substance of the complaint, cannot stand. Not only is it a catchall designed to protect insufficiently pled counts and to leave room for any other creative causes of action the Plaintiffs might conceive of, it precludes the Defendants from being able to defend against the Plaintiffs' attacks. Therefore, Count XI is dismissed.

During the hearing on the Defendants' preliminary objections, the Plaintiffs made a motion for partial summary judgment. Considering this Court's decision to sustain the preliminary objections of the Defendants and dismiss the complaint, it will suffice to refer to the discussion of the merits of the Plaintiffs' complaint as set forth above and deny the Plaintiffs' motion for partial summary judgment. Plaintiffs' motion to disqualify counsel for Ohio Casualty Insurance Company, Defendant John Brydon, alleges the Defendant would be

acting as attorney and witness in one proceeding. Clearly, Attorney Brydon potentially would have been a witness in this case but is not acting as an advocate. Thus, this motion is denied. The last motion by the Plaintiffs is to supplement the record. This motion is granted and the Court hereby takes judicial notice of the ***Erie Western Pa. Port Authority v. Gem City Marina*** transcript at Docket No. 12694-1995 as the Plaintiffs insist this proceeding, which is currently on appeal to the Superior Court, is somehow relevant to the Plaintiffs' motion to recuse this Court in the case at bar.

Therefore, for all the reasons set forth above, the Defendants' Preliminary Objections to Counts I through XI of the Plaintiffs' Complaint are sustained and the complaint is dismissed with prejudice.

BY THE COURT:

/s/ MICHAEL T. JOYCE
MICHAEL T. JOYCE, JUDGE

Order of the Court of Common Pleas of Erie County, Pennsylvania, Dated May 13, 1996

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

NO. 11703-1995

BURTON L. FISH and BUFFALO ROAD PROFESSIONALS, P.C.,

Plaintiffs,

V.

MARSH, SPAEDER, BAUER, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF, and THE OHIO CASUALTY INSURANCE COMPANY,

Defendants.

ORDER

AND NOW, to-wit, this 13th day of May, 1996, after considering the arguments, motions and briefs of counsel, it is hereby **ORDERED, ADJUDGED and DECREED** that the Defendants' Preliminary Objections to the Plaintiffs' Complaint are **GRANTED** and the Complaint is dismissed with prejudice. Defendants' Motion seeking attorneys' fees pursuant to 42 Pa. C.S.A. §2503(9) is granted. Plaintiffs' Motion for Partial Summary Judgment is denied as is the Motion to Disqualify Counsel John Brydon. However, the Plaintiffs' Motion to Supplement the Record is **GRANTED**. A hearing to determine appropriate attorneys' fees is scheduled for Friday, June 28, 1996 at 1:30 p.m. in Courtroom D.

BY THE COURT:

/s/ MICHAEL T. JOYCE
MICHAEL T. JOYCE, JUDGE

Order of the Court of Common Pleas of Erie County, Pennsylvania, Dated June 28, 1996

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

NO. 11703-1995

BURTON L. FISH and BUFFALO ROAD PROFESSIONALS,

Plaintiffs,

v.

MARSH, SPAEDER, BAUER, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF,

Defendants.

ORDER

AND NOW, this 28th day of June, 1996, a hearing was held to assess the amount of attorney's fees to be paid by the Plaintiffs, Burton L. Fish and Buffalo Road Professionals to the Defendant pursuant to an Order and Opinion dated May 13, 1996. Upon consideration of the evidence received during the hearing, and pursuant to 42 Pa. C..S.A. §2503(9), it is hereby **ORDERED, ADJUDGED AND DECREED** that the Plaintiffs pay Defendant Attorney William J. Schaaf the amount of $1,750.00 for 14 hours of work at the rate of $125.00 per hour, and Defendant Attorney Will J. Schaaf the amount of $562.50 for 4.5 hours of work at $125.00 per hour, for a total of $2,312.50. Let it be noted that during the

hearing the Court computed the total cost to be $1,812.50. This was a mathematical error and the correct amount is as set forth above.

BY THE COURT:

/s/ MICHAEL T. JOYCE
MICHAEL T. JOYCE, JUDGE

c: Burton L. Fish, Esq.
William J. Schaaf, Esq.

Notice of Entry of Judgment (Court of Common Pleas) of the Court of Common Pleas of Erie County, Pennsylvania, Dated October 21, 1997

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

NO. 11703-1995

BURTON L. FISH and BUFFALO ROAD PROFESSIONALS,

Plaintiffs,

v.

MARSH, SPAEDER, BAUR, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF,

Defendants.

NOTICE OF ENTRY OF JUDGMENT

TO: Burton L. Fish and
Buffalo Road Professionals, PC
5218 Buffalo Road
P.O. Box 7185
Erie, PA 16510

PLEASE TAKE NOTICE, that Judgment has been entered this 21st day of October, 1997, in favor of Marsh, Spaeder, Baur, Spaeder & Schaaf, and against Burton L. Fish and Buffalo Road Professionals in the total amount of $2,312.50; in favor of William J. Schaaf, Esq. in the amount of $1,750.00 and in favor of Will J. Schaaf, Esq. in the amount of $562.50, as per the Order dated June 28, 1996.

/s/ PATRICK L. FETZNER
Prothonotary

Notice of Entry of Judgment (Superior Court) of the Court of Common Pleas of Erie County, Pennsylvania Dated October 21, 1997

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

NO. 11703-1995

BURTON L. FISH and BUFFALO ROAD PROFESSIONALS,

Plaintiffs,

v.

MARSH, SPAEDER, BAUR, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF,

Defendants.

NOTICE OF ENTRY OF JUDGMENT

TO: Burton L. Fish and
Buffalo Road Professionals, PC
5218 Buffalo Road
P.O. Box 7185
Erie, PA 16510

PLEASE TAKE NOTICE, that Judgment has been entered this 21st day of October, 1997, in favor of Marsh, Spaeder, Baur, Spaeder & Schaaf, and against Burton L. Fish and Buffalo Road Professionals in the amount of $11,145.00, as per the Order of the Superior Court of Pennsylvania dated September 12, 1997.

/s/ PATRICK L. FETZNER
Prothonotary

Fish vs. Ohio Casualty—Plaintiff's Trial Brief and Leon Fish vs. Ohio Casualty Stipulations Submission to Common Law (Uninsured Motorist) Arbitrators as One Continuous Document

An Accident Report by PSP summarized the physical facts of an accident occuring on October 21, 1987. It was basically accepted as accurate by both parties to this litigation. Accordingly, the parties were able, during a pre-trial conference, to stipulate to the following:

Leon Fish, insured claimant, was guilty of no contributory or comparative negligence.

Debra Heliker (operator) and Patricia McCray (owner) were guilty of acts of negligence which were the proximate or legal cause of the accident and of the resulting personal or bodily injuries, suffered by Leon Fish, the insured claimant.

Leon Fish, the insured claimant, is entitled to monetary damages including special damages in the amount of $23,756.04, less first party benefits paid by Ohio Casualty in the amount of $10,000.00, together with general damages for pain and suffering in an unliquidated amount.

Neither Patricia McCray (owner), nor Debra Heliker (operator) were insured at the time of the accident, and therefore Ohio Casualty is liable pursuant to the Uninsured Motorist provision of the policy which it had issued to Leon Fish and Bertha Fish, his wife, which policy was in effect at the time of the accident.

The parties were, also, able to stipulate to the existance of the policy upon which this claim is based. The declarations sheet refers to both a Malibu station wagon and an Apache pop-up camper trailer. Although

no premium was charged for liability or uninsured motorist coverage with respect to the Apache, Ohio Casualty had issued to Leon Fish, the insured claimant, a PENNSYLVANIA FINANCIAL RESPONSIBILITY IDENTIFICATION CARD which certified that it had issued an owner's policy of liability insurance which

* * *

The policy insures "trailers" owned by the insured as a matter of definition. "Uninsured motor vehicle means a land motor vehicle or trailer of any type". "Your covered auto" means . . . 3. Any trailer you own . . . any . . . trailer you do not own while used as a temporary substitute"

Leon Fish, the insured claimant, is entitled to the benefit of stacking to the extent of the amount of policy limits, as thus construed, or the amount of damages as determined by the arbitrators.

Respectfully submitted,

Buffalo Road Professionals, PC
/s/ BURTON FISH
by Burton L. Fish, Esq.

LEON FISH VS. OHIO CASUALTY STIPULATIONS:

1. Leon Fish, insured claimant, was guilty of no contributory or comparative negligence.

2. Debra Heliker (operator) and Patricia McCray (owner) were guilty of acts of negligence which were the proximate or legal cause of the accident and of the resulting personal or bodily injuries, suffered by Leon Fish, the insured claimant.

3. Leon Fish, the insured claimant, is entitled to monetary damages including special damages in the amount of $24,000.00, less first party benefits paid by Ohio Casualty in the amount of $10,000.00, together with general damages for pain and suffering in an unliquidated amount.

4. Neither Patricia McCray (owner), nor Debra Heliker (operator) were insured at the time of the accident, and therefore Ohio Casualty is liable pursuant to the Uninsured Motorist provision of the policy which it had issued to Leon

* * *

Letter Dated June 29, 1992,
***Re*: Fish Arbitration**

MARSH, SPAEDER, BAUR,
SPAEDER & SCHAAF
Attorneys At Law
Suite 300
300 State Street
Erie, Pennsylvania 16507-1481

(814) 456-5301
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WILL J. SCHAAF
RITCHIE T. MARSH
WILLIAM J. SCHAAF
JAMES E. MARSH, JR.
JOHN P. EPPINGER
JOHN C. BRYDON
W. PATRICK DELANEY
THOMAS M. LENT
FRANCIS J. KLEMENSIC
JOHN B. FESSLER

EUGENE C. SUNDBERG, JR.
JAMES R. FRYLING
DONALD F. FESSLER, JR.

RITCHIE T. MARSH (1870-1947)
JAMES E. MARSH (1908-1988)
JOHN A. SPAEDER (RETIRED)
BYRON A. BAUR (OF COUNSEL)
ROBERT N. SPAEDER (RETIRED)

June 29, 1992

John R. Falcone, Esquire
2222 West Grandview Boulevard
Erie, PA 16506

Steven E. Riley, Jr., Esquire
100 State Street, Suite 700
Erie, PA 16507

Stephen H. Hutzelman, Esquire
305 West 6th Street
Erie, PA 16507

Re: Fish Arbitration

Gentlemen:

Enclosed please find an Arbitration Memorandum and copies of the medical records. With regard to Attorney Fish's Trial Brief, and specifically his

Stipulations on pages 10 and 11, I agree with Stipulations 1, 2, 4, 5 and 6 without qualification. Regarding Stipulation 3, I agree, except that I reserve the right to question the amount of the medical bills. With regard to Stipulation 7, I agree that the document issued, but assert that there are no conclusions to be drawn from the document regarding stacking of coverages.

Very truly yours,

MARSH, SPAEDER, BAUR,
SPAEDER & SCHAAF
/s/ By JOHN C. BRYDON
John C. Brydon

JCB/mag
Enclosures

FILED
SEP 11 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-286

In The

Supreme Court of the United States

October Term, 1997

BURTON L. FISH and BUFFALO ROAD PROFESSIONALS, PC,

Petitioners,

vs.

MARSH, SPAEDER, BAUR, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF and THE OHIO CASUALTY INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, Western District

RESPONDENTS' BRIEF IN OPPOSITION

JAMES R. FRYLING
Counsel of Record
MARSH SPAEDER BAUR
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(800) 274-3321 • (800) 359-6859

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Superior Court of Pennsylvania erred in quashing petitioner's appeal, finding his statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) to be a five-page incoherent dissertation?

2. Whether the Superior Court of Pennsylvania erred in quashing petitioner's appeal, finding that petitioner waived his claims by failing to raise them in the statement of matters complained of on appeal?

3. Whether the Superior Court of Pennsylvania erred in quashing petitioner's appeal on the basis that petitioner cannot collaterally attack the entry of summary judgment against his client in an ongoing case by filing a separate lawsuit against opposing counsel?

PARTIES TO THE PROCEEDINGS

The petition accurately reflects the parties to the proceeding.

STATEMENT PURSUANT TO RULE 29.6

The following is the parent of respondent, Ohio Casualty Company: The Ohio Casualty Group of Insurance Companies.

The following are nonwholly owned subsidiaries of The Ohio Casualty Group of Insurance Companies: West American Insurance Company, American Fire & Casualty Company, Ohio Security Insurance Company, and Ocasko Budget, Inc.

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APPENDIX

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OPINIONS BELOW

The Opinion and Order dated May 13, 1996, of the Court of Common Pleas of Erie County, Pennsylvania, is not officially reported.

The July 18, 1997 Memorandum Order of the Superior Court of Pennsylvania is not officially reported. The disposition of petitioner's appeal and petition for reargument to the Superior Court of Pennsylvania are reported at __ Pa. Super. __, 701 A.2d 786 (1997).

STATUTES INVOLVED

The statute here involved is Pennsylvania Rule of Appellate Procedure 1925(b), 42 Pa. Con. Stat., amended May 16, 1979, effective 120 days after June 2, 1979; Dec. 30, 1987, effective Jan. 16, 1988.

> (b) **Direction to file statement of matters complained of.**
>
> The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than fourteen (14) days after entry of such order. Failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.

CONCISE STATEMENT OF THE CASE

A. Procedural History

Petitioner, Attorney Burton L. Fish, and his professional corporation, Buffalo Road Professionals, P.C., commenced this action at law against the respondents, John C. Brydon, Francis J. Klemensic, and Will J. Schaaf, partners in the defendant law firm, Marsh Spaeder Baur Spaeder & Schaaf, by filing a Writ of Summons on May 1, 1995. On May 8, 1995, plaintiffs filed Interrogatories and Request for Admissions which were served upon all defendants. In response, defendants filed a Motion for Protective Order on May 15, 1995. This Motion for Protective Order was granted by the Court of Common Pleas of Erie County, Pennsylvania, on June 26, 1995.

On July 22, 1995, plaintiffs filed a complaint against the Marsh defendants and added The Ohio Casualty Insurance Company as a defendant. Defendants filed preliminary objections in the nature of a demurrer to plaintiffs' complaint. On September 13, 1995, plaintiffs filed a motion to recuse the Honorable Michael T. Joyce from further participation in the litigation. This motion to recuse was denied by the Court on October 3, 1995. On August 16, 1995, plaintiffs filed a motion to disqualify Attorney Brydon as counsel for defendant, Ohio, and a motion for partial summary judgment, as well as a motion to supplement the record.

On May 13, 1996, the Court of Common Pleas of Erie County, Pennsylvania: granted the defendants' preliminary objections and dismissed plaintiffs' complaint with prejudice; granted defendants' motion for attorneys' fees pursuant to 42 Pa. Con. Stat. § 2503(9); denied plaintiffs' motion for partial summary judgment; denied plaintiffs' motion to disqualify Attorney Brydon and granted plaintiffs' motion to supplement

the record (16a-17a). Plaintiffs filed a Notice of Appeal from this order to the Superior Court of Pennsylvania on June 12, 1996. On June 28, 1996, the Court of Common Pleas of Erie County, Pennsylvania, entered an order awarding attorneys' fees against the plaintiffs (14a-15a). The plaintiffs filed a notice of appeal from this order on July 26, 1996.

On July 18, 1997, the Superior Court of Pennsylvania filed a memorandum and judgment quashing the plaintiffs' appeal (1a). On September 12, 1997, the Superior Court of Pennsylvania issued an award of counsel fees to respondent (12a-13a) and, on September 19, 1997, denied petitioners' application for reargument (10a). On March 11, 1998, the Supreme Court of Pennsylvania denied petitioners' petition for allowance of appeal (8a).

B. Statement of Facts

This appeal arises from the judgment of the Superior Court of Pennsylvania quashing the petitioners' appeal in awarding counsel fees to the respondents (1a).

The present lawsuit has its genesis in a case in which plaintiffs' attorney, Burton L. Fish, and his professional corporation, Buffalo Road Professionals, P.C., represented his mother, Bertha Fish, and father, Leon Fish, in a personal injury action and claim for uninsured motorist benefits.

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

LEON C. FISH and BERTHA E. FISH,

Plaintiffs,

v.

PATRICIA McCRAY and DEBRA HELIKER,

Defendants

v.

LEON C. FISH,

Additional Defendant

On October 21, 1987, Leon and Bertha Fish, parents of petitioner, Attorney Burton Fish, were involved in an automobile accident in Erie County, Pennsylvania. Although neither Leon nor Bertha have any recollection of the events prior to or during the accident, the police reports and other evidence reveal that the driver of the other vehicle, Debra Heliker, crossed the center line of the roadway and collided with the Fishes' vehicle. Leon Fish was the operator and Bertha Fish was a passenger. Ms. Heliker, the operator, and Ms. McCray, the owner of the oncoming vehicle, were both uninsured motorists.

Attorney Fish commenced a personal injury action on behalf of his mother and father against both Heliker and McCray. Attorney Fish also filed suit on behalf of his mother, Bertha, against his father, Leon. The Ohio Casualty Group retained the firm of Marsh Spaeder Baur Spaeder & Schaaf and Attorney John C. Brydon to represent Leon Fish as an additional defendant. These lawsuits are currently pending in the Court of Common Pleas of Erie County, Pennsylvania, at Docket No. 2587 - 1989.

Leon C. Fish and Bertha E. Fish v. Ohio Casualty Group

Meanwhile, Leon and Bertha Fish, represented by petitioner, Attorney Fish, proceeded to an uninsured motorist arbitration pursuant to a policy of insurance issued by the Ohio Casualty Group to the Fishes. During the uninsured motorist arbitration proceeding, Ohio Casualty, through Attorney Brydon, and the Fishes, through Attorney Fish, agreed to certain stipulations. One stipulation agreed to by the parties was that Leon Fish, as driver, was not contributorily or comparatively negligent in causing the accident. As a direct result of this stipulation, the full single policy limits of the Ohio Casualty uninsured motorist benefits were awarded to the Fishes.

Attorney Fish then continued the personal injury civil action on behalf of Bertha against the driver and owner of the other vehicle and also against his father, Leon. Based upon the prior stipulation that Leon was not negligent, a motion for summary judgment pursuant to the Pennsylvania Rule of Civil Procedure No. 1035 was filed by respondent, Attorney Francis J. Klemensic, on behalf of Leon Fish in the case of *Leon Fish and Bertha Fish v. Patricia McCray and Debra Heliker v. Leon Fish*. This motion was vehemently opposed by petitioner, Attorney Fish. After hearing and upon review of the documents, including the stipulation, the trial court granted the motion for summary judgment, dismissing Leon Fish as an additional defendant. Attorney Fish then filed a Notice of Appeal to the Superior Court of Pennsylvania at Docket No. 49 Miscellaneous 1995. This appeal was dismissed by a *per curiam* order dated May 12, 1995. Attorney Fish then filed a Petition for Review and Application for Relief in the Supreme Court of Pennsylvania, which petition was also dismissed by a *per curiam* order dated October 6, 1995.

Thereafter, Attorney Fish and Buffalo Road Professionals commenced a cause of action by filing a complaint against the

respondents alleging bad faith bargaining, breach of duty to disclose, breach of contract, malicious use of process, abuse of process, tortious outrage, violation of professional ethics, tortious interference with business, conspiracy, perjury, subordination of perjury, fraud, collusion, false pretenses, nondisclosure, misrepresentation, official oppression, obstructing justice, defamation, disparage, intentional infliction of mental distress and vicarious liability. Defendants filed preliminary objections to the complaint in the nature of a demurrer. After the hearing, the lower court granted the plaintiffs' preliminary objections and request for counsel fees against the plaintiffs (A2-5, 11-21).

REASONS FOR DENYING THE WRIT

The respondents submit that the petitioner, Burton L. Fish, has failed to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257. Respondents contend that the jurisdiction of the Supreme Court of the United States is not properly invoked in this case. In this case, the validity of a treaty or statute of the United States is not drawn into question nor is the validity of a statute of any state being drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of or any commission held or authority exercised under the United States.

Moreover, petitioner, Attorney Fish, continues to attempt to argue the merits of his appeal, ignoring the fact that the Superior Court of Pennsylvania quashed his appeal on procedural grounds. The Superior Court of Pennsylvania, in quashing Attorney Fish's appeal, found his Statement of Matters Complained of on Appeal Pursuant to Pa. R.A.P. 1925(b) to be, in essence, a five-page, incoherent dissertation as to why

no stipulation existed between clients in the underlying tort case. In addition, the Superior Court of Pennsylvania found the appellant's brief to be in total derogation of the Pennsylvania Rules of Appellate Procedure.

Because none of the claims raised in appellants' brief were included in their statement of matters complained of on appeal pursuant to Pa. R.A.P. 1925(b), these issues were deemed to be waived. *Taylor v. Owens-Corning Fiberglass Corp.*, 446 Pa. Super. 174, 666 A.2d 681 (1995).

Finally, the Superior Court held that all of the issues raised in this litigation relate to the stipulation and subsequent grant of summary judgment in the underlying civil case. As the underlying case is still ongoing, the Superior Court held that the petitioner could not collaterally attack the entry of summary judgment against their client by filing a separate civil complaint against the opposing party's counsel. In essence, it would require the Superior Court of Pennsylvania to reach the merits as to the existence and validity of a stipulation at issue in a collateral proceeding which the Superior Court declined to do. *Commonwealth v. Ryan*, 358 Pa. Super. 459, 517 A.2d 1324 (1986).

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, Attorney Fish's petition should be denied.

Respectfully submitted,

JAMES R. FRYLING
Counsel of Record
MARSH SPAEDER BAUR
SPAEDER & SCHAAF, LLP
Attorneys for Respondents
Suite 300, 300 State Street
Erie, Pennsylvania 16507
(814) 456-5301

APPENDIX

APPENDIX A — JUDGMENT AND MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA, PITTSBURGH DISTRICT FILED JULY 18, 1997

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

NOS. 1066 & 1397 PITTSBURGH, 1996

BURTON L. FISH AND BUFFALO ROAD PROFESSIONALS, P.C.,

APPELLANTS

V.

MARSH, SPAEDER, BAUR, SPAEDER & SCHAAF, A PARTNERSHIP, JOHN C. BRYDON, FRANCIS J. KLEMENSIC AND WILL J. SCHAAF AND THE OHIO CASUALTY INSURANCE COMPANY

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that APPEALS QUASHED. JURISDICTION RELINQUISHED.

BY THE COURT:

s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: JULY 18, 1997

Appendix A

IN THE SUPERIOR COURT OF
PENNSYLVANIA

NO. 01066 PITTSBURGH, 1996
NO. 01397 PITTSBURGH, 1996

BURTON L. FISH AND BUFFALO ROAD PROFESSIONALS, P.C.,

Appellants

v.

MARSH, SPAEDER, BAUR, SPAEDER ¶ SCHAAF, A PARTNERSHIP, JOHN C. BRYDON, FRANCIS J. KLEMENSIC AND WILL J. SCHAAF AND THE OHIO CASUALTY INSURANCE COMPANY

Appeal from the Orders in the Court of
Common Pleas of Erie County, Civil
Division, No. 1995-11703

BEFORE, TAMILIA, J., FORD ELLIOTT, J., and BROSKY, J.

MEMORANDUM: FILED: JULY 18, 1997

Appellants, Burton L. Fish and Buffalo Road Professionals, P.C., take this appeal, pro se, from the May 13, 1996 Order, inter alia, granting appellees, preliminary objections and dismissing appellants' complaint with prejudice and the June 28, 1996 Order awarding counsel fees to appellees in the amount of $2,312.50.

Appendix A

The procedural and factual history is as follows. On October 22, 1987, Leon C. Fish (hereinafter Leon) and Bertha E. Fish (hereinafter Bertha), parents of Plaintiff, Attorney Burton Fish, were involved in a car accident. Although neither Leon nor Bertha could recall any details which preceded or occurred during the accident, the police reports and other evidence indicated that the driver of the other vehicle, Deborah Heliker, crossed the center line and collided with the Fishes' vehicle. It was also revealed that Ms. Heliker was uninsured. Attorney Fish filed suit on behalf of his parents against the uninsured motorist. He also brought suit against his father on behalf of his mother. Ohio Casualty Insurance Company, Leon's insurer, retained Defendant Attorney John Brydon to represent Leon. Meanwhile, Leon and Bertha proceeded to an uninsured motorist arbitration proceeding where both the insured and the carrier, Ohio Casualty, agreed to certain stipulations. Part of the stipulation stated that Leon was not contributorily nor comparatively negligent. Thus, the full single policy limits were awarded to the Fishes. Attorney Fish pursued an action on behalf of Bertha against the driver of the other vehicle and Leon, who it had previously been stipulated was not negligent by a written stipulation in letter form. Subsequently, a motion for summary judgment was filed by Defendant Francis J. Klemensic on behalf of Leon in the case of Bertha versus Leon and Heliker. Attorney Klemensic argued that the prior stipulation during the uninsured motorist arbitration hearing that Leon was not negligent entitled him to

> judgment as a matter of law. During argument, Attorney Fish vehemently insisted that the stipulation of Leon's non-negligence was never entered into even though he recognized that the full limits of coverage could not have been obtained without such finding. After a review of all the documents (including the written letter stipulation) and hearing arguments, the Court granted the motion for summary judgment. Thereafter, Burton Fish and Buffalo Road Professionals filed a complaint against the Defendants alleging bad faith bargaining, breach of duty to disclose, breach of contract, malicious use of process, abuse of process, tortious outrage, violation of professional ethics, tortious interference with business, conspiracy, perjury, subordination of perjury, fraud, collusion, false pretenses, nondisclosure, misrepresentation, official oppression, obstructing justice, defamation, disparagement, intentional infliction of mental distress, and vicarious liability. The Plaintiffs also put before the Court a motion to supplement the record and motion to disqualify Defendant, John Brydon, as counsel.

(Slip Op., Joyce, J., 5/13/96, pp. 1-2.)

In reaching its decision to dismiss appellants' complaint, the trial court analyzed eleven counts of the civil complaint and determined that several of the counts were not recognizable causes of action in Pennsylvania, several others were criminal allegations and the remaining counts were without merit. Appellants thereafter filed a timely notice of appeal followed by a statement of matters complained of on appeal pursuant to

Appendix A

Pa.R.A.P. 1925(b), which in essence was a five-page incoherent dissertation as to why no stipulation existed between their clients in the underlying tort case. On appeal to this Court, however, appellants, in a brief in total derogation of the Pennsylvania Rules of Appellate Procedure, raise the following claims:

> 1. Does an attorney's violation of PRCP 222, Attorneys as Witnesses, and Rules of Professional Conduct 3.7, Lawyer as Witness (comment, code comparison), constitute a waiver of judicial immunity?
>
> 2. If not, does any count of Plaintiffs' complaint allege non-privileged conduct, and thereby set forth a viable cause of action?
>
> 3. If any one Count of the complaint does thus set forth a viable cause of action, then are there others, and if so, which ones?
>
> 4. Assuming that one or more Counts set forth viable causes of action, does the Complaint itself reveal a fatal flaw that would justify dismissal, an affirmative defense (res judicata, pendency of another action)?
>
> 5. Were counsel fees properly awarded in this case against plaintiff for obdurate conduct, the mere filing of a praecipe for a writ of summons and a set of interrogatories, when defendants had not to that date disclosed their reliance upon the Brydon letter as an acceptance, despite attempted correspondence with Schaaf?

Appendix A

6. Does the lower court's role as a necessary witness require his recusal?

After our review of the record, and to the best of our ability considering appellants' lack of conformity to the Pennsylvania Rules of Appellate Procedure, we find all of the allegations raised in the underlying complaint and in the present appeal relate to the stipulation and subsequent grant of summary judgment in the underlying civil case. Specifically, the trial court made a specific finding in the underlying case, ***Fish v. Helicker and McCray v. Fish,*** *No.* 2587 Erie (1989), that a stipulation did exist and it is now apparent appellants are attempting to relitigate the granting of summary judgment through a separate lawsuit against opposing counsel. In fact, as noted in appellants' brief, the underlying case is still an ongoing matter.[1] Accordingly, we find appellants cannot collaterally attack the entry of summary judgment against their client by filing a separate civil complaint against the opposing party's counsel. In essence, this would require this Court to reach the merits as to the existence and validity of a stipulation at issue in a collateral proceeding. *See* ***Commonwealth v. Ryan,*** 358 Super. 459, 517 A.2d 1324, 1327 (1986) ("Clearly, prior judgments are presumed to be valid and may not be collaterally attacked in a subsequent proceeding.")[2]

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1. We found nothing in the record pertaining to the underlying action and, therefore, rely on the representation of appellants.

2. We note that none of the claims raised in appellants' brief were included in their Rule 1925(b) statement, thus denying the trial court the opportunity to address the claims and greatly hindering appellate review. In fact, appellants acknowledge this error in their appellate brief. We, therefore, find the failure to raise the issues amounts to a waiver. ***Taylor v. Owens-Corming Fiberglas Corp.,*** 446 Pa. Super. 174, 666 A.2d 681 (1995).

Appendix A

Appeals quashed.

Cases dismissed.

Jurisdiction relinquished.

APPENDIX B — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT DENYING PETITION FOR ALLOWANCE OF APPEAL DATED MARCH 11, 1996

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 693-94 Western District
Allocatur Docket 1997

Petition for Allowance of
Appeal from Superior Court

BURTON L. FISH AND BUFFALO ROAD PROFESSIONALS, P.C.,

Petitioner,

V.

MARSH, SPAEDER, BAUR, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF and THE OHIO CASUALTY INSURANCE COMPANY,

Respondents.

ORDER

PER CURIAM:

AND NOW, this 11th day of March, 1998, the Petition for Allowance of Appeal is hereby DENIED.

Appendix B

A True Copy Candace Y. Fry
as of: March 11, 1998
Attest: s/ Candace Fry
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX C — LETTER FROM THE SUPERIOR COURT OF PENNSYLVANIA, OFFICE OF THE PROTHONOTARY TO BURTON L. FISH, ESQUIRE DENYING APPLICATION REQUESTING REARGUMENT DATED SEPTEMBER 19, 1997

THE SUPERIOR COURT OF PENNSYLVANIA
OFFICE OF THE PROTHONOTARY
1015 GRANT BUILDING
PITTSBURGH, PENNSYLVANIA 15219

DAVID A. SZEWCZAK, ESQUIRE
PROTHONOTARY **(412) 565-7592**

ELEANOR R. VALECKO
DEPUTY PROTHONOTARY

September 19, 1997

Burton L. Fish, Esquire
5218 Buffalo Road
P.O. Box 7185
Erie, PA 16510

IN RE: Burton L. Fish, etc. v. Marsh, Spaeder, et al.
Nos. 1066 & 1397 Pittsburgh, 1996

Dear Mr. Fish:

The Court has entered the following Order on your Application for Reargument on the above-captioned matter:

"ORDER OF COURT

Appendix C

The court hereby DENIES the application filed August 1, 1997 requesting reargument or reconsideration of the decision dated July 18, 1997.

DATE: September 19, 1997.

PER CURIAM"

Very truly yours,

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

ERV: kks
cc: William J. Schaaf, Esquire
Honorable Michael Joyce

APPENDIX D — LETTER FROM THE SUPERIOR COURT OF PENNSYLVANIA, OFFICE OF THE PROTHONOTARY TO WILLIAM J. SCHAAF, ESQUIRE GRANTING APPLICATION FOR COUNSEL FEES DATED SEPTEMBER 12, 1997

THE SUPERIOR COURT OF PENNSYLVANIA
OFFICE OF THE PROTHONOTARY
1015 GRANT BUILDING
PITTSBURGH, PENNSYLVANIA 15219

DAVID A. SZEWCZAK, ESQUIRE
PROTHONOTARY **(412) 565-7592**

ELEANOR R. VALECKO
DEPUTY PROTHONOTARY

September 12, 1997

William J. Schaaf, Esquire
Suite 300
300 State Street
Erie, PA 16507

IN RE: Burton L. Fish and Buffalo Road v. Marsh, Spaeder, et al.
Nos. 1066 & 1397 Pittsburgh, 1996

Dear Mr. Schaaf:

The Court has entered the following Order on your Application for Counsel Fees in the above-captioned matter:

Appendix D

"ORDER

AND NOW, to-wit, this 12th day of September, 1997, upon consideration of appellees' Application for Counsel Fees in the amount of $11,145.00, said application is hereby granted.

PER CURIAM"

A Certified copy of the Order is being forwarded to the court below.

Very truly yours,

s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

ERV:kks
cc: Burton L. Fish, Esquire
Honorable Michael Joyce

APPENDIX E — ORDER OF THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA DATED JUNE 28, 1996

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

NO. 11703 - 1995

BURTON L. FISH and BUFFALO ROAD PROFESSIONALS,

Plaintiffs

v.

MARSH, SPAEDER, BAUER, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF,

Defendants

ORDER

AND NOW, this 28th day of June, 1996, a hearing was held to assess the amount of attorney's fees to be paid by the Plaintiffs, Burton L. Fish and Buffalo Road Professionals to the Defendant pursuant to an Order and Opinion dated May 13, 1996. Upon consideration of the evidence received during the hearing, and pursuant to 42 Pa. C.S.A. § 2503(9), it is hereby **ORDERED, ADJUDGED and DECREED** that the Plaintiffs pay Defendant Attorney William J. Schaaf the amount of $1,750.00 for 14 hours of work at the rate of $125.00 per hour, and Defendant Attorney Will J. Schaaf the amount of $562.50 for 4.5 hours of work at $125.00 per hour, for a total of $2,312.50. Let it be noted that during the hearing the Court

computed the total cost to be $1,812.50. This was a mathematical error and the correct amount is as set forth above.

BY THE COURT:

s/ Michael T. Joyce
MICHAEL T. JOYCE, JUDGE

c: Burton L. Fisk Esq.
William J. Schaaf Esq.

APPENDIX F — ORDER AND OPINION OF THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA DATED MAY 13, 1996

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

NO. 11703 - 1995

BURTON L. FISH and BUFFALO ROAD PROFESSIONALS, P.C.,

Plaintiffs

V.

MARSH, SPAEDER, BAUER, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF, and THE OHIO CASUALTY INSURANCE COMPANY,

Defendants

ORDER

AND NOW, to-wit, this 13th day of May, 1996, after considering the arguments, motions and briefs of counsel, it is hereby **ORDERED, ADJUDGED and DECREED** that the Defendants' Preliminary Objections to the Plaintiffs' Complaint are **GRANTED** and the Complaint is dismissed with prejudice. Defendants' Motion seeking attorneys' fees pursuant to 42 Pa. C. S.A. §2503(9) is granted. Plaintiffs' Motion for Partial Summary Judgment is denied as is the Motion to Disqualify Counsel John Brydon. However, the Plaintiffs' Motion to Supplement the Record is **GRANTED**. A hearing to determine

appropriate attorneys' fees is scheduled for Friday, June 28, 1996 at 1:30 p.m. in Courtroom D.

BY THE COURT:

s/ Michael T. Joyce
MICHAEL T. JOYCE, JUDGE

Appendix F

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

NO. 11703 - 1995

BURTON L. FISH and BUFFALO ROAD
PROFESSIONALS, P.C.,

Plaintiffs

V.

MARSH, SPAEDER, BAUER, SPAEDER & SCHAAF, a Partnership, JOHN C. BRYDON, FRANCIS J. KLEMENSIC and WILL J. SCHAAF, and THE OHIO CASUALTY INSURANCE COMPANY,

Defendants

OPINION AND ORDER

Burton L. Fish, Esq. on behalf of Plaintiffs
Will J. Schaaf, Esq. on behalf of Defendants

Joyce, J., May 13th 1996.

This matter is before the Court on the Defendants' Preliminary Objections to Plaintiffs' Complaint. For the following reasons, the Defendants' Preliminary Objections are granted.

The procedural and factual history is as follows. On October 22, 1987, Leon C. Fish (hereinafter Leon) and Bertha

Appendix F

E. Fish (hereinafter Bertha), parents of Plaintiff, Attorney Burton Fish, were involved in a car accident. Although neither Leon nor Bertha could recall any details which preceded or occurred during the accident, the police reports and other evidence indicated that the driver of the other vehicle, Deborah Heliker, crossed the center line and collided with the Fishes' vehicle. It was also revealed that Ms. Heliker was uninsured. Attorney Fish filed suit on behalf of his parents against the uninsured motorist. He also brought suit against his father on behalf of his mother. Ohio Casualty Insurance Company, Leon's insurer, retained Defendant Attorney John Brydon to represent Leon. Meanwhile, Leon and Bertha proceeded to an uninsured motorist arbitration proceeding where both the insured and the carrier, Ohio Casualty, agreed to certain stipulations. Part of the stipulation stated that Leon was not contributorily nor comparatively negligent. Thus, the full single policy limits were awarded to the Fishes. Attorney Fish pursued an action on behalf of Bertha against the driver of the other vehicle and Leon, who it had previously been stipulated was not negligent by a written stipulation in letter form. Subsequently, a motion for summary judgment was filed by Defendant Francis J. Klemensic on behalf of Leon in the case of Bertha versus Leon and Heliker. Attorney Klemensic argued that the prior stipulation during the uninsured motorist arbitration hearing that Leon was not negligent entitled him to judgment as a matter of law. During argument Attorney Fish vehemently insisted that the stipulation of Leon's non-negligence was never entered into even though he recognized that the full limits of coverage could not have been obtained without such finding. After a review of all the documents (including the written letter stipulation) and hearing arguments, the Court granted the motion for summary judgment. Thereafter, Burton Fish and Buffalo Road Professionals filed a complaint against the Defendants alleging bad faith bargaining,